Supreme Court, U.S.
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No. 90-663

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FREDERICK M. DEVER, JR.

Petitioner,

v.

THE STATE OF OHIO

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

(1) DOES THE CONFRONTATION CLAUSE PROHIBIT THE ADMISSION OF HEARSAY FALLING WITHIN THE FIRMLY ROOTED "MEDICAL TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE?

(2) DOES THE CONFRONTATION CLAUSE PROHIBIT THE ADMISSION OF A STATEMENT FROM AN UNAVAILABLE DECLARANT WHERE THE CIRCUMSTANCES SURROUNDING THE STATEMENT HAVE THE INDICIA OF RELIABILITY?

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OPINIONS BELOW

The order of the Ohio Supreme Court denying jurisdiction is reported at *State* v. *Dever*, 53 Ohio St.3d 701 (1990). The order of the Ohio Supreme Court denying petitioner's motion for rehearing is denied at *State* v. *Dever*, 53 Ohio St.3d 706 (1990). The opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, is unreported and set out herein as Appendix "A". The judgment entry of the Court of Common Pleas, Hamilton County, Ohio, is set out as Appendix "B".

JURISDICTION

This Court has jurisdiction to review the constitutional claims made under 28 U.S.C. 1257. This court does not have

authority to determine and interpret the Ohio Rules of Evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Section 1, to the Constitution of the United States.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO RULES OF EVIDENCE

Evidence Rule 803.

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of

medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Evidence Rule 804(A)(3).

"(A) **Definition of unavailability.** "Unavailability of a witness" includes situations in which the declarant:

* * *

"(3) Testifies to a lack of memory of the subject matter of his statement."

STATEMENT OF THE CASE

On October 21, 1987, Diane Potter lived on the second floor at 6947 Cambridge Drive in Mariemont, Hamilton County, Ohio. (T.p. 168, 235) The Dever family lived on the first floor. (T.p. 168, 169) The construction of the building was such that sounds from the first floor bathroom traveled through heating ducts to the second floor bathroom. (T.p. 169, 170)

Shortly after ten o'clock, Ms. Potter prepared to take a shower and could clearly hear voices from the first floor bathroom. (T.p. 169, 177) Ms. Potter heard Kristen Dever whining or crying and her step-father, defendant, saying "come on, come on, it will only take a minute." Kristen kept saying "no" and defendant kept saying "come on." Eventually, Kristen said "okay." (T.p. 171)

Following this, Ms. Potter heard defendant groaning loudly. (T.p. 172) Ms. Potter then described the exchange she heard as follows:

> "He groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good, daddy, and he said yes and then he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20 and she said no, I don't want to. I could hear mumbling and then I heard her say oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I." (T.p. 172)

Upon hearing this, Ms. Potter called police. (T.p. 172)

Mariemont Police Officer Mike Wilson initially received the call at 11:00 p.m. and asked Ms. Potter to come to the police station to make a report. (T.p. 233, 234) Officer Wilson, after consulting an assistant prosecuting attorney, located and consulted Kristen's mother the following day.

(T.p. 235, 236) On October 23, 1987, Kristen and her mother were taken to the Hamilton County Human Services, Sexual Abuse Intervention Team for an interview. (T.p. 237) Police Officer Wilson carefully laid out the circumstances leading to the statement. He was careful to have the victim's mother remove the victim from her home without a confrontation. (T.p. 251) The second day following Ms. Potter's 11:08 p.m. report to police, Officer Wilson met with Kristen Dever and Charlene Dever. (T.p. 261) At the meeting with the Sexual Abuse Intervention Team, Officer Wilson was careful not to characterize to the social worker the type of sexual activity he suspected. Only the Diane Potter statement was supplied. (T.p. 258) During the time going to the Welfare Department and Children's Hospital, Kristen did not discuss the offense with the police officer. (T.p. 262, 263) The officer did not indicate to Kristen or her mother that there was an eye witness to the offense. (T.p. 261) From there, Officer Wilson, Kristen and her mother went to Children's Hospital.

Dr. Ann Saluke, M.D., conducted the examination. (T.p. 192, 193, 194) Dr. Saluke testified that part of the examination procedure is an interview with the child. (T.p. 194) The purpose of the questioning is to get some indication of possible physical injuries, to determine the extent of contact, the possibility of sexual transmitted diseases, the risk of repeated exposure, and the risk of psychological damage. (T.p 194 to 200) The doctor further testified that the identity of the offender is necessary for proper diagnosis and treatment for the reasons stated above. (T.p. 195, 200)

The interview with Kristen began about 4:30 p.m. with the doctor, social worker, and Kristen's mother present. (T.p. 201, 202) Kristen would not answer any questions on the subject of the abuse as long as her mother was present. (T.p. 202) Instead, Kristen would simply jump from subject to subject. (T.p. 202) Kristen's mother was teary-eyed, stated Kristen had trouble talking in front of her on the subject, and said it would be better if she left the room. (T.p. 203)

After Kristen's mother left, Kristen told Dr. Saluke that her father, the defendant, put his "pee pee" in her mouth and

there was white stuff with a "yucky taste." (T.p. 209, 210) Kristen described the taste further and indicated the "pee pee" indicated genitalia. During the episode, Kristen said defendant touched her "pee pee." (T.p. 210)

On November 25, 1987, the Grand Jury of Hamilton County, Ohio returned indictment B-875350 charging defendant with Rape and Gross Sexual Imposition. Defendant entered a not quilty plea and retained counsel on December 4, 1988.

The court found the victim, defendant's four year old stepdaughter, could not testify on April 5, 1988. On August 29, 1988, a jury was impaneled and trial began. On September 1, 1988, the jury returned its verdict finding defendant guilty as charged.

The court imposed a sentence on October 12, 1988, of 10 to 25 years plus costs. Five years of the minimum was ordered to be actual incarceration.

On November 10, 1988, a notice of appeal was filed to the First District Court of Appeals, Hamilton County, Ohio. That court, in its opinion (Appendix A) determined that the trial court found the victim "unavailable" not "incompetent." That court also found sufficient indicia of reliability to allow admission of the out of court statement. The judgment was affirmed on January 31, 1990.

The Ohio Supreme Court thereafter declined to hear the case on June 13, 1990.

REASONS FOR DENYING THE WRIT

I

THE "CONFRONTATION CLAUSE" DOES NOT PROHIBIT THE ADMISSION OF HEARSAY WHICH FALLS WITHIN THE FIRMLY ROOTED "MEDICAL TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE.

ARGUMENT

In the recent case of *Idaho* v. *Wright*, ____ U.S. ___, 110 S.Ct. 3139 (1990), at 3147, this court reaffirmed that:

> "In **Roberts**, we suggested that the "indicia of reality" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception" or where it is supported by "a showing of particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S.Ct., at 2539; see also **Bourjaily**, 483 U.S., at 183, 107 S.Ct., at 2782 ("[T]he co-conspirator exception to the hearsay rule is firmly enough rooted in out jurisprudence that, under this court's holding in **Roberts**, a court need not independently inquire into the reliability of such statements") **Lee v. Illinois**, 476 U.S. 530, 543 106 S.Ct. 2056, 2063, 90 L.Ed.2d 514 (1986)."

One of the "firmly rooted" hearsay exceptions specifically listed by this court in *Idaho* v. *Wright*, supra, was the "medical treatment" exception.

In the case at bar the trial court relied upon *United States* v. *Renville*, 779 F.2d 430 (8th Cir., 1985), in determining to admit Dr. Saluke's testimony. (T.p. 24) Prior to admission of the testimony, Dr. Saluke testified that she explained to the child in a non frightening way the reason for the examination. She explained to Kristen that it was to see if there were any physical injuries and, if not, to see if the child was healthy. The doctor also imported the need to know where

the bugs or germs came from so that person could be treated. Kristen then indicated that her father put his penis in her mouth. (T.p. 199, 200, 209, 210)

It is respectfully submitted that the testimony here fell squarely within "medical treatment" exception to the hearsay rule and its admission did not violate the rule in *Idaho* v. *Wright*, supra.

II

THE CONFRONTATION CLAUSE DOES NOT PROHIBIT THE ADMISSION OF A STATEMENT FROM AN UNAVAILABLE DECLARANT WHERE CIRCUMSTANCES SURROUNDING THE STATEMENT HAVE THE INDICIA OF RELIABILITY.

In *Idaho* v. *Wright*, supra, this Court went on to hold that even statements which do not fall within the traditional "medical treatment" or other firmly rooted exceptions to the hearsay rule may be admitted if there is sufficient indicia of reliability. This Court specifically held that:

"[6] The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. See, e.g. **State v. Robinson**, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987), (spontaneity and consistent repetition); **Morgan v. Foretich**, 846 F.2d 941, 948 (CA4 1988) (mental state of the declarant); **State v. Sorenson**, 143 Wis. 2d 226, 246, 421 N.W.2d 77, 85 (1988) (use of terminology unexpected of a child of a similar age); **State v. Kuone**, 243 Kan. 218, 221-222, 757 P.2d 289, 292-293 (1988) (lack of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements

bear "particularized guarantees of trustworthiness" under the Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining "particularized guarantees of trustworthiness" under the Confrontation Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Idaho* v. *Wright*, supra, at 3150.

Here, the Court of Appeals determined that the trial court actually ruled that the victim was unavailable, not incompetent. She knew the difference between telling the truth and lying. (T.p. 8, 9) The trial court's ruling was explained in the record and later quoted by the Court of Appeals when it found that the child was frightened in the courtroom setting. She did have the ability to communicate and understood the obligation to tell the truth.

This leads us to the second part of the test. The indicia of reliability. The Court of Appeals among other things cited the details, related by Specialist Wilson, of the facts leading to the statement to Dr. Saluke. The record shows the following:

(1) There was no confrontation between police and the defendant in the presence of the child. (T.p. 236) Instead, police notified the mother of the victim at work and made arrangements to have the child examined without the father's knowledge.

(2) After the child was taken to the police station by her mother, Officer Wilson accompanied the mother and child to the social worker and doctor. During that period of time they steered clear of the subject of child abuse. There was no coaching. (T.p. 239, 263)

(3) The officer, while making the defendant's wife (and child's mother) aware of what led to the inquiry, at no time told her of actual witnesses. (T.p. 240)

(4) The initial report came from Diane Potter, a neighbor, not from a highly charged domestic dispute. (T.p. 172-174)

(5) The officer at no time characterized the sexual conduct suspected to the social workers or doctors. Instead, he merely gave them Diane Potter's statement. (T.p. 254, 258)

(6) At the hospital, the pediatrician, Dr. Saluke, made certain the child was not frightened. (T.p. 199)

(7) The pediatrician explained the necessity of determining what happened in terms of finding bugs and helping the person who touched her.

(8) The child insisted on talking to a doctor. (T.p. 211)

(9) The child refused to talk in the presence of her mother by continually changing the subject. This eliminates the prospect of the mother coaching the child. (T.p. 202)

(10) Immediately after the mother left the room the child described what happened in detail which goes beyond the knowledge of a four year old. She stated:

"A. Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the pee pee.

Q. Did she identify what she meant by father's pee pee?

A. The same area.

Q. Okay, now did she describe that taste any further beside yucky taste?

A. She described it as mashed potatoes with butter." (T.p. 209, 210)

It is respectfully submitted that even if the statements did not fall within the medical treatment exception to the hearsay rule, there was sufficient information demonstrating that the statement was reliable. Thus, no violation of the "confrontation clause" of the Sixth Amendment made applicable to the states through the Fourteenth Amendment occurred.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-880712
TRIAL NO. B-875350

STATE OF OHIO,
Plaintiff-Appellee,

vs.

FREDERICK DEVER, JR.,
Defendant-Appellant.

OPINION

Criminal Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: January 31, 1990

Arthur M. Ney, Prosecuting Attorney, Leonard Kirschner, Esq., Christian J. Schaefer, Esq., and James E. Butler, Esq., 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Yaros & Yaros and G. David Yaros, Esq., 615 East Seventh Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

HILDEBRANDT, J.

Defendant-appellant Frederick Dever, Jr., appeals from the judgment of the Hamilton County Court of Common Pleas in which he was found by intervention of a jury to be guilty of rape.[1] For the reasons that follow, we affirm the trial court's judgment.

On February 21, 1987, the appellant resided with his wife and adopted daughter, Kristen, on the first floor of a two-family residence located in the village of Mariemont, Ohio. Diane Potter resided on the second floor of the building. At approximately 10:00 p.m., Potter was in her bathroom preparing to shower when she heard the appellant and Kristen talking.[2] At trial, Potter testified as follows:

> I heard Kristen crying and I heard [appellant] saying come on, come on, it will only take a minute and Kristen kept saying no, Daddy, I'm sleeping and he kept saying come on, come on, Kristen, come on, it is only going to take a minute. She said no, Daddy, I'm sleeping and then finally she said o.k. and I guess — I could hear them talking and it was just mumbling and it seemed like it was getting closer but I wasn't really paying attention at that time because I figured, I didn't really know what he was getting her up for but I figured it was something she had to do.
>
> * * *
>
> And I heard — anyway, I heard the voices getting louder and then I heard the toilet seat so I knew they

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[1] The appellate had been charged with rape, R.C. 2907.02, and gross sexual imposition, R.C. 2907.05. The jury returned guilty verdicts as to each count. The trial court, finding that the charges were of similar import, imposed a sentence on the rape count only.

[2] Appellant's wife was at work at the time of the events *sub judice*.

were in the bathroom because that's where the toilet is.

* * *

Then I heard them talking, I heard [appellant] groaning, he groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good, Daddy, and he said yes, and he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20, and she said no, I don't want to. I could hear mumbling and then I heard her say, oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I, and then I just left the house, and went next door and called the police.

T.p. 171-72.[3]

Potter reported the foregoing conversation to Specialist Mike Wilson of the Mariemont Police Department. Wilson concluded that Potter's accusations warranted an investigation. The following day, Wilson informed the appellant's wife of Potter's allegations, and arranged for the removal of the child from the appellant's control. The next day, February 23, Wilson arranged for the intervention of the sexual abuse team of the Hamilton County Department of Human Services ("HCDHS"). Wilson informed the HCDHS team that the appellant was the alleged perpetrator. With the aid of HCDHS, Kristen was examined by Ann Saluke, M.D., at Children's Hospital.

Although Dr. Saluke's physical examination neither confirmed nor disproved a history of sexual conduct, during the

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[3] Potter explained the she could hear and understand the foregoing exchange through a heating duct that was common to both bathrooms. See, also, State's Exhibit 1.

exam Kristen told the doctor that she had sexual contact with appellant.

Before the trial, the trial judge determined Kristen's competency to testify.[4] At the conclusion of the pretrial hearing, the court stated:

> All right, I have to conclude the rule says those children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or relating them truly and there is no question that Kristen understands the truth and the difference between the truth and false statements and that she is a bright little girl. The problem is she just can't relate what happened in this instance two years ago, if it did occur, and for that reason I can't find her competent under [Evid. R.] 601 to testify as a witness under this test.
>
> * * *

T.p. 20. At trial, Dr. Saluke was permitted to testify, over the appellant's objection, concerning Kristen's statement to her, as follows:

> Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the peepee.

T.p. 209-10.

At the conclusion of the evidence, the jury returned the verdicts described above and the appellant was sentenced as it appears of record. Appellant now argues on appeal that the trial court erred by allowing Dr. Saluke to testify concerning

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[4] Kristen was three and one-half years of age at the time of the alleged offenses and five and one-half years of age at the time of the proceedings below.

what Kristen had told her about the crime *sub judice*. We are unpersuaded.

The Supreme Court of Ohio recently ruled on the use of a child's statement of identification made to an examining physician, under circumstances similar to the case before us, in *State* v. *Boston* (1989), 46 Ohio St. 3d 108, 545 N.E.2d 1220. In *Boston*, the abused girl awakened screaming during the night following a period of visitation with her estranged father. The child told her mother, "* * * Daddy put something up my bucket [vagina]." *Id.*, at 108, 545 N.E.2d at ____. The mother than observed redness in the vicinity of the child's genitals.

The following day the child was examined by a pediatrician, but the child refused to permit the doctor to touch her. The doctor's visual examination of the child's vaginal and anal areas yielded nothing of note.

An internal physical examination of the child was not made until approximately one month later, during which time the father continued to visit her. Upon internal examination, the doctor made findings that were consistent with sexual conduct.[5] During the examination, the child told the doctor that the father was the perpetrator.

The child was also examined by a psychologist who observed the child "* * * play with [anatomically correct] dolls in a sexually precocious manner, [heard] the child use slang terms for genitalia, and noted signs of autonomic hyperactivity — typical of victims of child sex abuse." *Id.*, at 120, 545 N.E.2d at ____ (footnote omitted).

At Boston's trial, the mother and the two experts (the pediatrician and the psychologist) were permitted to testify about what the child told them concerning the identity of the perpetrator. The experts were further permitted to opine that the child's statements to them were truthful.

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[5] At trial, the pediatrician testified that the child suffered probable vaginal penetration and possible anal penetration. She further stated that "probable" meant 95-99 percent certainty while "possible" mean greater than fifty percent certainty.

During the pretrial hearing to determine the three-year-old child's competency to testify, the child answered initial questions, sometimes by a nod of the head. She denied having been hurt and she made it clear that she did not want to talk to the judge. The court found the child incompetent to testify. During the trial, the court further explained its ruling:

> The child seems frightened, and considering the age of the child, considering the general fact of this particular case the Court based its incompetency or fact that the child was not allowed to be called on that and not on the ability of the child to understand its obligation to tell the truth and its ability to communicate.

Id., at 114, 545 N.E.2d at ____ (Emphasis omitted).

In *Boston*, the Supreme Court of Ohio interpreted the trial court's ruling as having found the child to be unavailable as contemplated by Evid. R. 804(A) rather than incompetent to testify as prescribed by Evid. R. 601. The court explained:

> Thus, the trial judge really found (the victim) unavailable as a witness rather than incompetent to be a witness. We recognize that appellant contends (admittedly with some efficacy) that such a finding is not supported by the record. However, the determination of competency (and availability) is within the sole discretion of the trial court and absent a showing of an abuse of discretion, such a determination will not be disturbed by a reviewing court. We find no abuse of discretion here.

Id., at 115, 545 N.E.2d at ____ (Emphasis omitted).

In *Boston*, the Supreme Court of Ohio reversed the father's conviction of gross sexual imposition because the trial court denied him a fair trial by permitting the experts to testify that, in their opinion, the child told them the truth when she identified the father as the perpetrator. *Id.*, at 128-29, 545 N.E.2d at ____. The Supreme Court also determined that the

use of expert testimony in child abuse cases is proper, *id.* at 120, 545 N.E.2d at ____, and set down guidelines for the use of such expert testimony. Among those guidelines, the court directed:

> (F) When a child declarant is unavailable and does not testify either at a hearing or trial and no exception to the hearsay rule is applicable and when "indicia of reliability" are absent, to satisfy the requirements of the Confrontation Clause the out-of-court statements must have a particularized "guarantee of trustworthiness." To show that there is a "guarantee of trustworthiness," the proponent of a child's out-of-court statements must prove that a good-faith effort has been made to produce the child as a witness, there must be specific evidence of abuse, either physical or emotional, and there must be no apparent motive to falsify the out-of-court statements.

Id., at 127, 545 N.E.2d at ____ (Emphasis omitted). The court then held:

> * * * [A]n out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court.

Id.

In the cause *sub judice*, as in *Boston*, the trial court precluded the victim from testifying because she could not remember the events constituting the alleged crimes. In both cases, the trial court concluded that the child could comprehend the differences between truthful and false statements and relate facts truly. See Evid. R. 601. Regardless of the trial

judge's statements in this case concerning Kristen's competency to testify, we believe that Kristen, whom the state attempted to qualify as a witness, was *unavailable* under the Supreme Court's reasoning in *Boston*, and pursuant to Evid. R. 804. The rule states in pertinent part:

> (A) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> (3) testifies to a lack of memory of the subject matter of this statement.

See *supra* at 6-7. We therefore hold that the element of unavailability, under the Supreme Court's *Boston* guidelines concerning the admissibility of a sexually abused child's out-of-court statement to an expert,[6] has been satisfied. See *supra* at 8.

Further, we find no evidence from which the trial court could have concluded that Kristen was fabricating the events set forth in her statement to Dr. Saluke. Rather, we find there was a guarantee of trustworthiness in the child's statement because the events concerning the crime related by Kristen would ordinarily have been far afield from the knowledge of a three-and-one-half-year-old child.

The fact that Dr. Saluke did not find evidence of physical or emotional abuse differentiates this case from *Boston*. However, we place great significance upon what Ms. Potter heard. Specialist Wilson, the investigating officer, made certain that he related, in great detail, the events leading up to Dr. Saluke's examinaton of Kristen to the HCDHS sexual abuse team. See t.p. 54-55. Furthermore, Dr. Saluke acknowledged at trial that she was aware the appellant was the alleged perpetrator prior to Kristen's out-of-court statement to her. See t.p. 215.

We, therefore, hold that, under the facts of this case,

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[6] The expertise of Dr. Saluke, who had administered to approximately two hundred fifty child-abuse victims, was not challenged below.

Kristen's out-of-court statement was admissible during the proceedings below. Accordingly, we overrule the appellant's solitary assignment of error and affirm the trial court's judgment.

KLUSMEIER, P.J., and UTZ J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX B

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

CASE NO. B875350

THE STATE OF OHIO,

vs.

Frederick Dever,

Defendant.

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel Louis Rubenstein on the 12th day of October 1988 for sentence.

The Court informed the defendant as the defendant well knew, after trial by Jury, the defendant had been found guilty of the offenses of Rape 2907.02 R.C., Count 1, and Gross Sexual Imposition 2907.05 R.C., Count 2.

The Court afforded defendant's Counsel an opportunity to speak on behalf of defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's own behalf or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Ohio State Penitentiary for a minimum term of Ten (10) years (Five (5) years Actual) to a maximum term of Twenty-five (25) years. (Count 2 is an allied offense of similar import and no sentence

is passed pursuant to R.C. 2941.25.)
Pay costs.

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JUDGE

Defendant was notified of the right to appeal as required by Crim. R. 32 (A)(2)